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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-455

WOODROW SEE, *Petitioner,*

v.

LOCAL UNION 417, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I. Did the court of appeals err in affirming the district court's summary judgment of dismissal on the ground that plaintiff did not exhaust his intra-union remedies?

II. Did the court of appeals err in affirming the district court's summary judgment of dismissal on the additional ground that the undisputed facts in the record showed no violation by the Union of its duty of fair representation?

STATEMENT OF THE CASE

The Facts

There is no dispute between petitioner and respondents as to the basic, material facts of this case, which are as follows:

Petitioner Woodrow See was employed by the Hawthorne Metal Products Company in 1958; on July 10, 1962, See was discharged for refusing to follow a supervisor's instructions. Shortly thereafter, respondent Union filed a grievance protesting See's discharge, claiming that it violated the terms of the collective bargaining agreement between the company and the Union. The grievance was processed through the first four steps of the grievance procedure. Unable to secure See's reinstatement at these levels, the Union demanded that the grievance be submitted to arbitration. An arbitration hearing was held and on September 12, 1962, the arbitrator issued a decision and award. (1b-7b)[1]

The arbitrator found that See had wrongfully disobeyed his supervisor's instructions, but ordered him reinstated without back pay, thus reducing the discharge to a disciplinary suspension. (7b)

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[1] Record references are to the appendices submitted in the Court of Appeals and to the appendix included at the end of the Petition; i.e., "—a" and "—b" refer respectively to petitioner and respondents' appendices in the Court of Appeals. "A—" refers to the appendix in the Petition.

Immediately after the award was rendered, the company called See back to work. The dispute giving rise to this case begins here. When he appeared at the plant, the company informed him that it would be necessary for him to have a physical examination by the company's doctor in accordance with the company policy of requiring anyone absent from the plant for more than 30 days to have an examination. (41b) See had been absent from the plant since his discharge on July 10, 1962, a period more than double the 30-day limit in the company's physical examination policy. See had the examination and the company's doctor reported that he had a bad back and should not be returned to work. (8b) Based on this report, the company notified the Union that See could not be reinstated. The Union immediately protested the company's action, and in a meeting on September 28, 1962, at which See was present, obtained an agreement that See would be examined by a doctor designated by the union and if the results of that examination conflicted with the report of the company's doctor, a third doctor would be selected whose report would be determinative. (8b-9b)

Pursuant to the September 28th agreement, See was examined, at the Union's expense, by another doctor. (10b) At the conclusion of this examination, the doctor informed See that the results were inconclusive and that before a final opinion on See's back condition could be made, spinal x-rays should be made and reviewed by an orthopedic consultant.

See refused to have the spinal x-rays, and on October 31, 1962, filed a grievance claiming that the company should reinstate him without further physical

examinations. It was at this point the Union decided that the question of additional physical examinations should be put to one of the attorneys in the Legal Department of the International Union. (21a) The question was discussed with an assistant general counsel at a meeting at which See was present. (21a) The attorney advised that See should have the spinal x-rays and orthopedic examination and that his October 31st grievance should be held pending the results of this examination. After the meeting, the president of Local 417 drove See to Beaumont Hospital. Although the president had arranged for Local 417 to pay for the orthopedic specialist's examination, See never had the x-rays or the examination. (20a-21a)

At a union membership meeting on December 2, 1962, the chairman of the shop committee reported that he was referring See's case to the local president and to an international representative. (22a) See protested this action, and his case was presented to the local's executive board on December 4, 1962. The executive board initially passed a resolution calling for the appointment of a three-member committee to meet with the company and negotiate See's reinstatement as soon as possible. (22a) At the next executive board meeting on December 17, 1962, however, the board rescinded its earlier resolution and passed a new one which provided that See should follow the advice of the UAW's Legal Department and have the x-rays and orthopedic examination. (22a-23a)

At this point See asked Dean Spooner, a fellow employee who had represented and assisted See at the executive board meetings and who six months later was elected president of the local, to represent him in

an internal union appeal to the International Executive Board of the UAW. (23a) Spooner declined, indictating that he felt he lacked experience, and suggested that See retain a lawyer to represent him on an internal appeal since the UAW's Constitution allowed for representation by counsel. (23a) Instead, See filed an unfair labor practice charge against the local with the National Labor Relations Board. See never did take an internal union appeal.

In his charge, filed April 3, 1963, See alleged that the Union had, in violation of its duty of fair representation, refused to process his October 31, 1962 grievance. (23b) After investigation, the Regional Director for Region Seven, on May 22, 1963, notified See that his charge was dismissed. (24b-25b) In the dismissal letter, the Regional Director summarized the events that had taken place and noted that See had never had the spinal x-rays and orthopedic examination. The Regional Director concluded that "there is no evidence which would show that the Union failed to process the grievance filed by [See] on or about October 31 for considerations which would be unfair, unreasonable or arbitrary . . . ." (25b) See appealed to the General Counsel of the National Labor Relations Board, and on July 31, 1963, the General Counsel affirmed the dismissal of the charge, "substantially for the reasons stated in the Regional Director's latter of May 22, 1963". (26b)

Thereafter, See again contacted Dean Spooner, who by this time was the president of the local, and, for the first time, brought to Spooner's attention the fact that See had been examined by his own doctor and had received a report, dated November 12, 1962,

stating he was physically able to return to work. (24a) Spooner took this report to the company and requested that it be regarded as the report of the union designated doctor, and, since it conflicted with the company doctor's report, that a third doctor be appointed whose decision, according to the terms of the September 28, 1962 agreement, would be determinative. (24a-25a)

The company initially agreed to the Union's request and submitted the names of two doctors, one of whom would act as the third doctor. (27b-28b). Neither was acceptable to the Union, and in a letter dated September 24, 1963, Spooner proposed that the third examination be done at either Henry Ford, Harper, Metropolitan or the University Hospital at Ann Arbor. (25a) A day later, the company rejected the Union's proposal and took the position the See case was closed. (25a; 30b) On that same day, Spooner notified the company that the Union did not consider the case closed (31b), and on October 10, 1963, Spooner had the chairman of the shop committee file a grievance protesting the company's refusal to meet with the Union to discuss the case and its refusal to agree to an impartial medical facility for the third examination. (32b)

The company twice refused to discuss the grievance, taking the position the case was closed. In the meantime, however, See was examined at Henry Ford Hospital and received a report that he was able to work. (25a) This report was submitted to the company in a meeting on December 13, 1963. When the company refused to accept it, the Union proposed that if See was reinstated the demand for back pay for the

period subsequent to the company's refusing to allow him to work because of the company doctor's report would be dropped. The company indicated that it would consider the proposal. (25a)

On December 30, 1963, the Union signed a memorandum agreement which provided that See would be reinstated with full seniority rights but without back pay. (36b) That same day See reported to work, but when requested to sign the memorandum agreement, refused to do so. (26a) In January 1964, the instant action was commenced against the company and the Union. At no time has See made an attempt to exhaust any of the internal union remedies provided in the Constitution of the International Union, UAW. On April 9, 1964, an order of discontinuance was entered in the district court as to the company; this was the result of a $15,000.00 settlement between See and the company.

The Decision of the District Court

On the basis of the affidavits, exhibits and depositions in the record, the district court entered a memorandum opinion granting the Union's motion for summary judgment. (A7-A10)[2] The district court held there was "no question about the fact that plaintiff

[2] This was the second time the complaint had been dismissed and summary judgment granted the Union. On February 10, 1967, the district court had dismissed the complaint, finding the action one within the exclusive primary jurisdiction of the National Labor Relations Board. (A3-A5) Fourteen days later and while this dismissal was on appeal to the Court of Appeals for the Sixth Circuit, this court decided *Vaca* v. *Sipes*, 386 U.S. 171, 17 L.Ed. 2d 842, 87 S. Ct. 903 (1967). On the basis of that decision, the court of appeals vacated the district court's judgment and remanded the case for consideration in the light of *Vaca*. (A6-A7)

did not only fail to exhaust his intra-union remedies but did not even appeal from the Local 417 executive board's decision." (A9) In response to plaintiff's reliance on this court's opinion in *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed. 2d 519, 89 S. Ct. 894 (1969), the district court noted that in *Glover* "[t]here was present * * * an element of futility (as to exhaustion of intra-union remedies) to such a degree as to provide an exception to the exhaustion rule". (A10) The district court found no such elements present in the instant case, noting that if the mere existence of a dispute between a member and his union was "a basis for sustaining a claim of futility [,] then the exhaustion requirement could never be enforceable". (A10)

The Court of Appeals' Decision

On June 13, 1973, the Court of Appeals for the Sixth Circuit entered an order affirming the district court's judgment granting summary judgment for the Union. (A13) The court of appeals affirmed the district court on two grounds.

First, the court found that the undisputed record established that See had not exhausted his intra-union remedies which, absent an element of futility, "he was required to do before maintaining this action." (A13)

Second, the court of appeals held that the undisputed record did "not reveal any issue of fact to be tried concerning any claim of fraud, deceitful action, dishonesty, arbitrary or discriminatory conduct or bad faith on the part of the union," and thus summary judgment was properly granted for the Union. (A13) The court of appeals also noted, without making it a

ground for decision, that in an action for breach of the duty of fair representation, a plaintiff can recover from the union "only to the extent that the union's conduct, rather than the conduct of the company, caused actual damage to him." (A13)

ARGUMENT

As reasons for granting the writ petitioner asserts that the decision below is in conflict with decisions of this Court and other courts of appeals and violated his right to a jury trial on the issue of damages.

I. The Decision in This Case Does Not Conflict with Any Decision of This Court.

Petitioner asserts that the decision in this case conflicts with this Court's decisions on (1) exhaustion of intra-union remedies in duty of fair representation suits, and (2) arbitration of labor-management disputes.

1

Petitioner claims the decision here conflicts with what this Court has ruled and said on exhaustion of intra-union remedies in three cases: *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 21 L.Ed. 2d 519, 89 S. Ct. 548 (1969), *Czosek, et al.* v. *O'Mara, et al.*, 397 U.S. 25, 25 L.Ed.2d 21, 90 S. Ct. 770 (1970), and *Syres* v. *Oil Workers International Union, Local No. 23 and Gulf Oil Corporation,* 350 U.S. 892, 76 S. Ct. 152, *rehearing denied* 350 U.S. 943, 76 S. Ct. 299 (1955). In two of them — *Czosek* and *Syres* — the exhaustion of intra-union remedies was not even discussed, and the third, *Glover,* the rule applied by this Court was the one applied in this case,

the difference in result reflecting only the differences in facts.

In *Glover,* thirteen employees, most of whom were Black, filed a suit against the railroad and the union alleging they were denied promotions to higher job classifications because of racial discrimination. To the claim that it had violated its duty of fair representation, the union defended on the ground that the employees had not exhausted their intra-union remedies. The Court acknowledged the requirement[3], noting that it has exceptions, one of which applied — the futility exception. In concluding that it would have been futile for the employees to exhaust their intra-union remedies, the Court had recourse to the following facts: the employees were told they "could never get white men's job", they "were treated with condescension by both [the union and the company], sometimes laughed at and sometimes 'cussed' ", "the white plaintiffs were referred to as 'nigger lovers' " and told "that they were just inviting trouble", and both the railroad and union "attempted to intimidate [them]". 394 U.S. at 326-327.

The district court, in the instant case, recognized the futility exception, saying: "[T]here was present [in Glover] an element of futility (as to the exhaustion of intra-union remedies) to such a degree as to provide

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[3] Congressional approval of the exhaustion requirement was given in Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), which protects a union member's right to sue his union, subject to the proviso that "such member may be required to exhaust reasonable hearing procedures (but not to exceed a four months lapse of time) within such [labor] organization, before instituting legal or administrative proceedings against such organization or any officer thereof".

an exception to the exhaustion rule." (A10) On the undisputed facts in *this* case, however, the court found no futility. The court of appeals agreed. Plainly, there is no conflict between this case and *Glover*. In *Glover* this Court applied the exhaustion requirement but found futility. In this case the courts below applied the exhaustion requirement and, on the totally different facts involved here, found no futility.

Petitioner's reliance on *Czosek, supra,* and *Syres, supra,* is even more misplaced since neither case involved a question of exhaustion of intra-union remedies. *Czosek* involved exhaustion of *administrative* remedies under the Railway Labor Act, not intra-union remedies under a union constitution, as petitioner virtually admits and as the court of appeals' decision in *Czosek* makes clear. *O'Mara* v. *Erie Lackawanna Railroad Company, et al.,* 407 F. 2d 674, 678 (2nd Cir. 1969).

In *Syres, supra,* the district court dismissed a Black local union's action against a white local and the employer for racial discrimination on the ground that it lacked jurisdiction, and the court of appeals affirmed. 223 F.2d 739, 744 (5th Cir. 1955). In its memorandum decision of reversal, this Court simply cited three of its duty of fair representation cases involving racial discrimination, indicating that the duty of fair representation supplied a jurisdictional basis for the action. The exhaustion of intra-union remedies requirement — raised not by the union, but by the employer — was nowhere discussed.

2

Petitioner also asserts that the decision below conflicts with a line of this Court's decisions "which

enunciates the strong public interest in maintaining the integrity of the grievance and arbitration processes".[4]

But this case has nothing whatsoever to do with the integrity of the grievance and arbitration processes. This is not a case in which one of the parties refused to arbitrate a grievance, or balked at an arbitration award. See *was* called back to work, as the arbitrator had ordered. What happend thereafter (the company's requiring him to take the physical; his failing it; and the company's refusal to return him to work) was not a failure of compliance with the arbitration award, but a new problem, which the Union came to grips with, and ultimately solved, with its usual tool — collective bargaining. It bargained the company into agreeing to further physicals, and ultimately bargained it into agreeing to See's reinstatement despite his having failed the original physical. This is not a story of the arbitration process betrayed, but of its being honored — and followed by practical collective bargaining on a new problem which arose in the wake of the original discharge.[5]

Thus there is no conflict between the decision in this case and any of this Court's decisions.

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[4] E.g., *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960); *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960); *Steelworkers* v. *American Manufacturing Company*, 363 U.S. 564, 4 L.Ed. 2d 1403, 80 S.Ct. 1343 (1960).

[5] Moreover, even if we assume, *arguendo*, that the matter of the physical examination was not a new problem, but one as to the implementation of the award, for the parties to resolve it by good faith collective bargaining—rather than by going back to the arbitrator, or to court in cross-suits on the award—supports the arbitration process, rather than undermines it.

II. The Decision in This Case Does Not Conflict with Decisions of Other Courts of Appeals.

Petitioner asserts that the decision here is in conflict with four decisions by other courts of appeals. There is, however, no conflict whatsoever. In all four cases the other courts of appeals applied the same basic rule applied here, *i.e.*, a member cannot recover against his union on a duty of fair representation claim without exhausting his intra-union remedies, unless it would be futile for him to pursue them.[6] The only differences between the four decisions and the one here are in result — all of which are due to factual or procedural differences.

In *Brady v. Trans World Airlines, Inc.*, 401 F. 2d 87, 104 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1043, the court ruled that the exhaustion of internal union remedies requirement applies to all claims *for breach of the duty of fair representation*, saying:

> It has been the general rule, and the rule of this circuit, that before a suit against a union *for breach of its duty of fair representation* may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. (Emphasis added.)

The one claim to which the court refused to apply the exhaustion requirement was *not* for breach of the duty of fair representation, but for violation of Section 2 (Fourth) (Eleventh) of the Railway Labor Act, dealing with union security. *Id.* at 102.

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[6] Other courts of appeals have also applied this rule. See, e.g., *Imel* v. *Zohn Mfg. Co.*, — F.2d —, 71 CCH Lab Cases Para. 13.773 (10th Cir. 1973), and *Neal* v. *System Board of Adjustment*, 348 F.2d 722 (6th Cir. 1965), decision by then judge, now Justice Blackmun.

In both *Retana* v. *Apartment, Motel, Hotel & El. Op. U., Local No. 14,* 453 F. 2d 1016 (9th Cir. 1972), and *Orphan* v. *Furnco Construction Corp.,* 486 F. 2d 795 (7th Cir. 1972), the members' actions were dismissed not on motions for summary judgment, but on motions to dismiss, and on the ground that the complaints failed to allege exhaustion of intra-union remedies. And in each, the court of appeals reversed because other facts alleged in the complaint, if proved, might constitute futility. 453 F. 2d at 1027-28, 466 F. 2d at 801-02.

In *Fredrickson* v. *System Fed. No. 114 of Ry. Emp. Dept.,* 436 F. 2d 764 (9th Cir. 1970), the district court ruled against the members on the ground of failure to exhaust intra-union remedies. The court of appeals reversed on the ground that there was absolutely no evidence in the record of a union remedy. *Id.* at 768. In the instant case the district court's dismissal on the exhaustion ground was based on an undisputed record which included evidence of the internal-union remedies available to petitioner. (23a; Articles 31 and 32, UAW Constitution, attached to motion to dismiss filed February 25, 1963)

Petitioner's claim of conflict with other circuits is utterly unsupported.[7]

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[7] Petitioner also claims the court of appeals violated his right to a jury trial on damages. After setting forth its two grounds for affirmance, the court of appeals noted, by way of *dictum,* that even if the Union were liable, petitioner could recover only to the extent that he might have been damaged by the Union's conduct, as distinguished from the company's. The most obvious error in petitioner's claim that this paragraph deprived him of his right to a jury trial is that, as noted, the paragraph is not a ground for decision but is plainly *dictum.*

CONCLUSION

For the foregoing reasons respondents submit that a writ of certiorari should not issue.

Respectfully submitted,

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